

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Amendment of Part 90 of the Commission's Rules)	PR Docket No. 93-144
to Facilitate Future Development of SMR Systems)	
in the 800 MHz Frequency Band)	
)	
Implementation of Sections 3(n) and 322 of the)	GN Docket No. 93-252
Communications Act—Regulatory Treatment of)	
Mobile Services)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act—Competitive Bidding)	

To: The Commission

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COMMENTS OF THE CITY OF CORAL GABLES, FLORIDA

The City of Coral Gables, Florida (sometimes referred to herein as "Coral Gables" or "the City"). by its attorney and pursuant to Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c), and Section 1.415(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.415(a), hereby offers its comments on the *First Report and Order*, *Eight Report and Order*, and *Second Further Notice of Proposed Rulemaking* ("Notice")¹, FCC 95-501, released December 15, 1995, in the captioned matter.

I. INTRODUCTION

Coral Gables is a Public Safety Radio Service eligible² and licensee. These comments address the City's concerns regarding the effect of the actions taken and contemplated in this proceeding on the continued availability of General Category channels for public safety communications systems.

The City of Coral Gables is located in Dade County Florida, an area of dense population where frequency resources are limited due to high demand and usage by both SMR and non-SMR users alike.

¹ As the title of the document suggests, the Commission took some actions and proposed others. While these comments are limited to a relatively narrow aspect of the *Second Further Notice of Proposed Rulemaking* (public safety treatment of General Category channels), Coral Gables will also address one aspect of the *First Report and Order*, namely, the reallocation of the General Category channels to exclusive SMR use, but only insofar as such action has the effect of disqualifying Public Safety eligibles from General Category licensing.

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The city's current population is 41,250 permanent residents, a number that will increase by approximately 20% due to pending annexation of adjacent populated areas.³ The city is also host to approximately 34,000 business and vacation visitors each day. To provide effective protection of the lives and property of those in its charge, the City requires that its public safety officers be equipped with the best resources. A reliable public safety radio communications system is one of the best tools available to ensure timely and effective response.

Public safety users are no less affected by spectrum shortages than the rest of the mobile radio industry. For public safety systems, however, much more is at stake than greater efficiency in a business operation or increased revenue and profitability to a commercial service provider. The mission of Coral Gables and other public safety users is to protect the lives, safety, and property of residents and visitors in their jurisdictions. Mobile radio is an integral and critical part of this mission. The public interest demands that the Commission take public safety spectrum needs into account in crafting its spectrum allocation and radio licensing regulations.

The General Category channels, which have heretofore been available for use by public safety eligibles, are very important in providing some relief to spectrum shortages. While this allocation is crowded as well, there are times when no Public Safety Category channel is available, but one or more General Category channels can be applied for or acquired by assignment of an existing authorization. This is a valuable option that should be preserved. The *First Report and Order*, however, reallocates the General Category channels for exclusive SMR use, but contains no acknowledgment of, much less analysis or justification for, the impact on public safety users. The record in the proceeding is essentially void of public safety comments, and Coral Gables believes this is substantially due the Commission's failure to give adequate notice that it would be taking actions having such a direct and adverse impact on

² "The Public Safety Radio Services include the Local Government, Police, Fire, Highway Maintenance and Forestry-Conservation Radio Services." 47 C.F.R. § 90.15. *See also*, 47 C.F.R. §§ 90.16 through 90.25.

³ Upon completion of the annexation, the city will encompass 15,000 residential and 2,989 commercial structures.

public safety licensees.⁴ Perhaps more distressing than the lack of adequate prior notice is the fact that the *First Report and Order* does not even acknowledge, much less offer a justification for, the effect of this unexpected reallocation on public safety users.

The Commission is reminded that, “[i]n taking actions to manage the spectrum to be made available for use by the private mobile services,” first and foremost among its considerations is to be “whether such actions will . . . promote the safety of life and property.” Section 332(a)(1) of the Communications Act of 1934, as amended (hereinafter the “Communications Act”), 47 U.S.C. § 332(c)(1). The Commission can honor this Congressional mandate by adopting spectrum allocation and licensing policies that properly reflect the relative worth of using spectrum for promoting the safety of life and property over other uses that may be *in* the public interest, but are in no way as important *to* the public interest.

Coral Gables herein makes specific recommendations with respect to the accommodation of public safety users in the Commission’s proposed new regulatory structure for the General Category channels. Specifically, the City urges the commission to reverse its reallocation of the General Category insofar as it disqualifies public safety eligibles. Coral Gables also urges the Commission not to apply geographic licensing and spectrum auctions to the General Category channels. Should the Commission nonetheless decide to implement geographic licensing and spectrum auctions, Coral Gables alternatively

⁴ This proceeding has been captioned as essentially an SMR proceeding, and at no time has the Commission taken any specific steps to advise the public that public safety licensees were to be significantly affected in any way. The *Further Notice of Proposed Rule Making*, FCC 94-271; released November 4, 1994, at paragraphs 51-54, made only passing mention of public safety use of the General Category and Pool channels. While the possibility of an exclusive SMR reallocation was mentioned, a fair reading of the *Further Notice* is that the Commission was more inclined to prohibit SMR usage of the band segment, insofar as it was already proposing a major reallocation for the benefit of wide area SMR operators, and had “tentatively conclude[d] that [it] should revise [its] eligibility rules for the General Category and Pool Channels to prohibit SMR and non-SMR applicants from applying for the same channels.” *Further Notice* at ¶ 53. And there is certainly no suggestion there or in any other public utterance that the Commission would take an action to disenfranchise public safety eligibles from the entire General Category block. While there is a limit to the efforts the Commission must make to alert potentially affected parties of its proposed actions, Coral Gables respectfully submits that, where something as important to the public interest as public safety communications is involved, the Commission should devote at least as much of its resources to facilitate the full participation of state and local agencies as it does in publicizing its spectrum auctions.

recommends specific special provisions designed to minimize the adverse impact on public safety communications systems.

II. CONTINUED PUBLIC SAFETY ELIGIBILITY ON THE GENERAL CATEGORY CHANNELS

The Commission's reallocation of all General Category channels exclusively to SMR use, when the *First Report and Order* becomes effective,⁵ will preclude public safety eligibles from applying for new or acquiring existing facilities using General Category channels. The disqualification of public safety users from eligibility for General Category channels is not in the public interest, and Coral Gables urges the Commission to reconsider that aspect of the reallocation decision.⁶

The General Category channels are very important to Public Safety operations in South Florida, and undoubtedly the same is true in most other areas of the country. Some public safety agencies depend entirely on these channels for their public safety communications. Other public safety agencies use General Category channels to supplement or augment their conventional and trunked operations in the 800 MHz band. In the Broward/Dade County Area of Florida, there are no spectrum alternatives for public safety licensees other than General Category channels.

General Category channels are technically compatible with the 70 Public Safety Pool Channels as well as channels allocated under the National Public Safety Plan (NPSPAC channels). In fact, currently, as well as for many years prior to NPSPAC, FCC Channel No. 96 is/was used as a statewide mutual aid channel bringing together state and local public safety agencies in times of natural disasters and public emergencies. Clearly such use furthers the public interest, convenience and necessity.

Local governments frequently find that the spectrum allocated specifically for public safety use in the Commission's rules are not adequate to satisfy their needs. For example, the Coral Gables recently purchased a 7.5 million dollar digital simulcast trunking radio system. By the time Coral Gables was able

⁵ The rule changes made in the *First Report and Order* are to become effective 30 days after publication in the Federal Register. To the best of the City's knowledge, such publication has not yet occurred and, if it has, occurred less than 30 days ago.

⁶ The deadline for seeking formal reconsideration has not yet passed. Section 1.429(d) of the Rules requires that petitions seeking reconsideration of rulemaking actions be filed within 30 days of Federal Register publication. 47 C.F.R. § 1.429(d); see n.4, *supra*. Coral Gables will submit a formal request for limited reconsideration on or before the appropriate deadline, but presents the matter here as well because the comments offered on the Commission's proposed rules assume public safety eligibility on the General Category channels.

to invest in this system, there were not enough available channels in the Public Safety category to satisfy its requirements. Accordingly, the city negotiated for the purchase of existing systems operated by private sector firms, one of which is a conventional SMR using a General Category channel. Coral Gables understands that many other public safety users also commonly supplement their spectrum requirements by licensing (through initial application or assignment) General Category channels.

The Commission bases the decision to reallocate in large part on its finding that the predominant use of the General Category is SMR. It is ironic that this would be the justification for an action that effectively ousts public safety users from the band. The over-population of the band by SMR users is the logical result of speculation, short spacing, and trunking the previously conventional-only channels. These are the very activities, allowed if not encouraged by Commission policy, that have resulted in many public safety systems being "boxed in" and unable to expand their systems. Unlike SMRs and other Commercial Service operators, public safety cannot react immediately to Commission actions and marketplace demands. Public Safety entities must work within budgetary cycles and plan well in advance to place their technical facilities in operation.

The spectrum shortage in general and the lack of adequate Public Safety category channels to meet present and future needs is a serious problem. The ability to supplement public safety needs with General Category channels, while not a panacea, is nonetheless a useful tool which should not be removed. Moreover, retaining public safety user eligibility will not unduly interfere with the regulatory goals of the Commission's reallocation for at least two important reasons.

- The exception to the SMR-only eligibility will be limited to public safety users, thereby minimizing the impact of any future non-SMR licensing.
- Given the depletion of available General Category channels in most markets of any significant population, it is likely that the vast majority of future public safety licensing on such channels will involve the transfer or assignment of existing facilities, rather than application for new facilities. Thus, subject to other recommendations made herein, the public safety user will merely assume the position of a site-specific licensee who would, under the Commission's proposal, already be grandfathered.

Continuing to allow public safety users to obtain General Category authorization will thus have minimal, if any, adverse impact on the Commission's regulatory objectives, while at the same time providing a

substantial public interest benefit of maintaining a valuable tool for ameliorating the scarcity of public safety spectrum resources.

III. PROPOSED GEOGRAPHIC LICENSING AND AUCTIONS FOR GENERAL CATEGORY CHANNELS

A. The Commission Should Not Adopt Geographic Licensing and Auctions.

The Commission has sought comment on the possibility of using geographic licensing and spectrum auctions for General Category channels. Coral Gables respectfully submits that this would be ill-advised. The current General Category landscape and channel usage can be quite accurately described as an overcrowded hodgepodge. There are systems of various types (commercial, private, public safety, etc.) and of every technical configuration (conventional, small trunked, large trunked, local, regional, analog, digital, etc.). Moreover, in all but the smallest of markets there are virtually no more channels available for new licensing. Moreover, what room is left for licensing in the General Category can be expected to disappear rapidly by virtue of voluntary or mandatory relocation of incumbents by 800 MHz wide area bidders and licensees.

When the foregoing is coupled with the Commission's proposal for complete protection of incumbents—a proposal which Coral Gables whole-heartedly supports—it becomes clear that very little, if anything, would be gained by moving to geographic licensing. Unlike the situation with 900 MHz SMR or MMDS (where geographic licensing and auctions arguably provides incumbents the ability to expand and consolidate their licensed areas), it is extremely unlikely that geographic licensing on General Category channels will benefit incumbents. On any given channel or set of channels in the General Category pool, we can expect to find a large number of unaffiliated incumbent users.⁷ Incumbents will be battling among themselves in addition to third-party bidders in any auction.

Whoever wins such an auction will owe so much protection to so many incumbents over so much of the market as to make the authorization worth very little. Since this lack of value will presumably be reflected in the amounts bid, it is not too far-fetched to suggest that an effort to auction geographic

⁷ For this reason, if the Commission does decide to auction geographic licenses for General Category channels, it should consider the use of much smaller geographic units. Counties or cellular MSAs/RSAs would be more appropriate in this regard than either BTAs or EAs. Bidders desiring larger areas in specific cases can still accomplish this by bidding on multiple licenses.

licenses on the General Category channels may actually run counter to the Congressional goal of “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use.” Section 309(j)(3)(C) of the Communications Act, 47 U.S.C. § 309(j)(d)(C). The auction may well cost more than it raises for the public.

B. If the Geographic Licensing and Auctions are Adopted for General Category Channels, Special Provision Should be Made for Public Safety Eligibles.

In the alternative, should the Commission nonetheless adopt rules providing for geographic licensing and spectrum auctions with respect to the General Category channels, Coral Gables urges the inclusion of special provisions for public safety eligibles.

1. Special Incumbency Provisions for Public Safety Users

The Commission has proposed that General Category incumbents be protected from interference by the geographic licensee, and that incumbents will be permitted to make modifications provided their overall 22 dBμ contour is not increased. In view of the increased public interest importance of public safety use, Coral Gables recommends that, if the incumbent is a public safety user, it be permitted to make modifications that increase the 22 dBμ contour, subject to the following conditions:

- The modified 22 dBμ contour does not encroach the service contour (40 dBμ) of any existing site-based incumbent or any constructed and operating base station of the geographic licensee;
- The site is not relocated more than ten miles from the previously authorized location; and
- The total cumulative increase in the 40 dBμ contour within any one license term shall be no greater than 10% of the total area of the originally authorized contour.

These provisions will give licensees increased flexibility to meet important public safety needs while still providing adequate protection to other co-channel licensees, both site-specific and geographic.

2. Special Public Safety Provisions as to Geographic Licensees

Coral Gables also recommends that the Commission adopt special public safety provisions applicable to geographic licensees. Specifically, geographic licensees should be under specific obligation to provide service and/or capacity to public safety users upon reasonable demand therefor, and geographic licensees should be permitted to disaggregate their authorization to accommodate public safety users.

a. Obligation to Provide Service/Capacity

Insofar as the General Category channels have been reallocated for exclusive SMR use, any geographic licensee will be a commercial mobile radio service (“CMRS”) provider. The Commission is authorized to impose common carrier obligations on CMRS licensees. In order to address the shortage of spectrum available for public safety use, the Commission should specifically clarify that any geographic licensee will be required to provide service to a public safety user on non-discriminatory terms upon reasonable request. Further, in the event there is no capacity available to honor such a request at the time it is made, the CMRS licensee should be required to develop wait list policies that give priority to public safety customers. While not as effective as the other methods described herein for addressing public safety spectrum needs, this specification will at least increase the ability of public safety users to meet their requirements on an end user basis.

b. Disaggregation of Geographic Licenses

A General Category geographic licensee should be permitted to disaggregate any part of its authorization to accommodate the needs of a public service eligible. This could take two forms. First, the geographic licensee may consent to the public safety eligible obtaining a site-based license within its authorized geographic area. Second, a sub-area of the geographic area may be transferred to the public safety user. In either case, the use made of the disaggregated area should reflect favorably on the geographic licensee’s buildout requirements by either effectively reducing those requirements or counting toward them. This proposal would allow public safety users to continue to use private contractual means to accommodate their spectrum requirements.

3. Public Safety Eligible Participation in General Category Auctions

Finally, if there are to be auctions for geographic licenses on General Category channels, public safety users should be eligible to participate and to bid on and obtain such licenses.⁸ The Commission’s auction authority is limited to services in which “the principal use of such spectrum will involve, or is

⁸ The Commission would be justified in reallocating some portion of the General Category channels exclusively to public safety use, but this would probably not be practical given the high occupancy of the band. Thus, for the same reasons it opposes geographic licensing and spectrum auctions, *see* Section III.A, *supra*, Coral Gables does not recommend a public safety set-aside in this pool. If auctions are used, however, public safety licensees should not be precluded from participating.

reasonably likely to involve, the licensee receiving compensation from subscribers.” Section 309(j)(2)(A) of the Communications Act, 47 U.S.C. § 309(j)(2)(A). As the Commission has found, and Coral Gables concedes, the predominant use of the General Category channels is and will continue to be commercial (*i.e.*, SMR), thereby satisfying that requirement. But neither Section 309(j)(2)(A) nor any other statutory provisions precludes the Commission from also permitting public safety users to participate in an otherwise proper auction in order to address spectrum shortage issues.

Section 309(j)(6) of the Communications Act provides, in pertinent part: “Rules of Construction. - Nothing in this subsection, or in the use of competitive bidding, shall —(A) alter spectrum allocation criteria and procedures established by the other provisions of this Act; [or] (B) limit or otherwise affect the requirements of . . . any other provision of this Act (other than subsections (d)(2) and (e) of this section).” 47 U.S.C. § 309(j)(6)(A)–(B). Thus, the Commission’s obligation to consider whether its spectrum allocation policies for the private mobile services will “promote the safety of life and property,” Section 332(a)(1) of the Communications Act, 47 U.S.C. § 332(a)(1), is in no way diminished or altered by the auction provisions, and will fully justify, if not require, the arrangement suggested by Coral Gables.

Moreover, in view of the higher public interest value of public safety use, special preferences and accommodations should be made for public safety eligibles. In order to qualify for such preferred treatment, the bidder must be eligible in the Public Safety Radio Service in accordance with Section 90.15 of the Commission’s Rules, 47 C.F.R. § 90.15, or be a consortium of such eligibles, provided that the basis of eligibility must relate to public safety activities within the area for which the geographic license is being sought. Coral Gables recommends the following specific preferences and accommodations for public safety eligibles:

- *No Upfront Payment or Reduced Upfront Payment.* An elimination of or significant reduction in any required upfront payment is justified on the basis of the proposed public safety use of the license and the fact that the bidder will be a local government entity. Moreover, budgeting and requisitioning procedures for many local government entities may preclude the ability to raise the required money in the time frame prescribed for the auction. On this basis the Commission would be justified in not applying an upfront payment requirement to public safety eligibles, or perhaps assessing only a minimum payment (*e.g.*, \$2,500), regardless of the number activity units on which the public safety eligible seeks to bid.

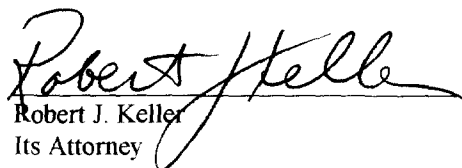
- *Bidding Credits and Installment Payment Provisions.* For similar reasons, bidding credits and favorable installment payment terms should be extended to public safety eligibles. Coral Gables submits that a bidding credit of at least 25% would be justified.⁹ Moreover, as to down payment and installment payment provisions, as to public safety eligibles the Commission should, after the auction, negotiate a payment schedule with the winning bidder on a case-by-case basis. The budgeting and requisition process for different state and local government entity will vary, and a uniform schedule can not be prescribed.
- *Non-applicability of Anti-Collusion Rules to Public Safety Eligibles.* While public safety eligibles may form consortia to bid on a geographic license, it is also possible that two or more public safety eligibles may bid independently on the same license with the goal of subsequent disaggregation by or shared use with the successful bidder. Communications between public safety eligibles during the auction should be permitted to facilitate these goals.
- *Disaggregation.* If a public safety eligible is the successful bidder for a geographic license, it should be afforded complete flexibility to disaggregate its authorization to other public safety entities and/or commercial users, provided that some portion is retained for public safety use.

IV. CONCLUSION

The City respectfully urges the Commission to retain public safety eligibility for General Category channels and not to adopt geographic licensing and spectrum auctions for these channels. If the Commission adopts geographic licensing of the General Category channels, Coral Gables urges the inclusion of the special provisions discussed above for the protection of public safety interests and to address the shortage of spectrum for public safety communications.

Respectfully submitted,

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⁹ One of the underlying purposes for spectrum auctions is the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use." Section 309(j)(3)(C) of the Communications Act, 47 U.S.C. § 309(j)(3)(C). If the license goes to a public safety eligible, the spectrum will not be commercial use, but will indeed be put directly to the use and benefit of the public.